The Income Tax Exemption for Charities for Australian Indigenous Peoples

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MOTIVATION

Taxation law in all common law countries grants significant fiscal benefits to ‘Charities’. The main benefit is the exemption from income tax. In order to gain the tax concessions in Australia a charity must be registered with Australian Taxation Office (ATO) and is then referred to as a Tax Concession Charity (TCC).

This research investigates the intersection between income tax law and charity law in Australia, New Zealand and Canada. The analysis is placed in the context of the application of these two legal areas to organisations for the advancement of indigenous peoples.

The major focus is how the income tax exemption for charities has been applied in the context of the well-being of Australian indigenous people and the impact of the significant fiscal advantages that may result.

As indigenous entities work towards developing their own solutions to the current problems of alienation and poverty through an emphasis on community capacity and development of social capital, the application of the legal concept of charity as it relates to indigenous organisations is a significant factor due to the important fiscal and social benefits that result from charitable status.

ISSUES

This discussion raises two important issues: firstly, that charities must be for the ‘public benefit’ which requires a broader group of beneficiaries than those related by ‘family’; and that the traditional concept of charity precludes ‘political activity or advocacy’. Both these issues are of significant concern to indigenous peoples in Australia, New Zealand and Canada. Legislation has recently been enacted in New Zealand to overcome the limitation of ‘blood-ties’ and this may lead the way for such developments in Australia.

SIGNIFICANCE OF TAX CONCESSION CHARITIES TO THE AUSTRALIAN COMMUNITY

The Australian Taxation Office (ATO) advises that there are currently around 700,000 non-profit organisations in Australia and some 160,000 of these are registered with the ATO. Not all of the registered entities are exempt from income tax as charities although they may gain tax concessions in other ways. As at November 2005, there were just over 48,000 tax concession charities registered with the ATO in Australia. The ATO advises that non-profit organisations employ around 10% of Australian workers.

TABLE: MAIN ACTIVITY OF CHARITIES (TCC)

The information in the table has been obtained from the ATO and shows how a significant percentage of these TCCs identify their main activity as ‘Indigenous persons’.” Indigenous Persons” was the 10th highest identified major charitable activity at this time. Some of the other main charitable activities are shown as a point of comparison with education being the most commonly identified activity. Also as entities often indicated more than 1 main activity the other charities with education, health and poverty as their main activity may also benefit Indigenous persons and vice versa.

DETAILED EXPLANATION OF ISSUES

Public benefit: A charity must be for the benefit of the community or a section of the community. The Australian cases have recognised that organisations for the benefit of indigenous people generally or indigenous people in a certain location or indigenous people who are members of a particular profession benefit a sufficient section of the community but if the beneficiaries are limited by some form of personal consideration such as family relationship or employment with a particular employer then the purpose is not charitable. It must also be remembered that this limitation does not apply to charitable objects for the relief of poverty and this will be the case provided that the aim of the charitable objective is limited to the assistance of indigenous people who are in need.

The common law of Canada and New Zealand follows this line of reasoning however the taxation legislation in New Zealand has been amended to provide that the ‘public benefit’ requirement is not breached where the beneficiaries are connected by blood. The public benefit restriction has adverse consequences for charities benefitting family groups such as entities established under the Commonwealth Native Title legislation.

Political Activity/Lobbying: A second problem area is that of advocacy and the cases indicate that political or lobbying activities that are incidental to the charitable purpose of an organisation will not affect its charitable status. On the other hand an organisation will not be considered charitable if its purpose is advocating a political party or cause, attempting to change the law or government policy, or propagating a particular point of view even if the subject matter of the change concerns the relief of poverty, or advancement of education or religion – all charitable purposes. In other words, even though the end might be a charitable object if it is to be achieved through advocacy the courts and ATO have placed severe restrictions on the granting of charitable status and will only grant this status if the advocacy activities are incidental to the charitable purpose.

This is a severe restriction on charities for the advancement of indigenous peoples who rely on advocacy to formulate and advance government policy and influence community attitudes towards a more equal society.

METHODOLOGY

Legal Research

The research involves an analysis of the legal issues from a legal doctrinal perspective, considering the history of the legal concept of charity and the development of judicial knowledge in this area in the context of the exemption from income tax. The legal narrative follows the development of the common law and legislation in Australia, Canada and New Zealand and compares these developments in the context of the issues of public benefit and political advocacy.

Lobbying. The research also involves analysis from a public policy perspective in order to understand and explain the importance of charities and the third sector to a developed and sophisticated society such as Australia.

Qualitative research

Interviews will be conducted with the following peak representative indigenous entities: the Northern Land Council, Central Land Council, Myuma Corporation, Australian Institute of Aboriginal and Torres Strait Islander Studies (AARTIS), the National Aboriginal and Torres Strait Island Ecumenical Commission of the National Council of Churches in Australia and the Office of the Register of Indigenous Corporations. This is to obtain feedback about their experiences when applying for tax concession charity status and/or in navigating the tax system, as it relates to charities for indigenous peoples. It is anticipated that these interviews will also expand on the ideas already formulated regarding the significance of charitable status to these organisations, the barriers that they face and the importance of these barriers.